In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-838

FREDERICK PARKER FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the warrantless search of his truck upon probable cause was unreasonable under the Fourth Amendment and that the district court erred in excluding testimony intended to show that the marihuana found in petitioner's trunk might have been a species other than that specified in the statutory definition of marihuana.

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing 10,000 pounds of marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to four years' imprisonment, to be followed by a two-year special parole term. The court of appeals affirmed *per curiam*.

The evidence showed that on February 14, 1974, a truck rented and driven by petitioner apparently struck and damaged a canopy at the entrance to the Holiday Inn in Homestead, Florida (Tr. 7-9, 20-21). In response to a call from the Inn's manager, a Homestead police officer, Raymond Shuck, arrived at the scene to fill out an accident report (Tr. 20-22). Shortly thereafter, another local police officer, Clinton Terry, arrived to investigate the accident (Tr. 7-8). While Officer Shuck questioned the motel manager and petitioner, Terry went to the truck, which was parked in a public parking lot across the street from the Inn, to estimate the damage (Tr. 8, 22-23). As Terry stood on the hood of his vehicle to see the damage to the top of petitioner's truck, he observed a substantial hole in the truck's roof and several burlap bags covered in plastic, one of which was protruding through the hole (Tr. 9-10, 18). He also detected a strong odor emanating from the truck, which smelled "like a wet grass or weed of some sort," but he was unable at that time to identify the cargo (Tr. 13-14). Continuing his investigation, he reached in and felt the first bag; it appeared to contain some type of grass (Tr. 13).

When Officer Shuck and petitioner came over to the truck, Terry asked Shuck if he knew the nature of the truck's contents (Tr. 24-25). Shuck said petitioner had told him that the truck contained furniture (Tr. 24-25). Terry then asked petitioner about the contents, and he responded, "marijuana" (Tr. 16, 27).[1] Shuck arrested

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[1]At the suppression hearing, Terry testified that petitioner responded to a question which had actually been directed to Officer Shuck (Tr. 16). Petitioner, who did not testify at the hearing, stated at trial that he had said, "[i]t looks like Marijuana to me," in response to a direct question from one of the officers (Tr. 149).

petitioner, advised him of his rights, and placed him in a patrol car that was alongside the truck (Tr. 11, 28). At the officers' request, petitioner gave them his key to the truck; they opened the back of the truck, examined the contents of two bags, and burned a small amount of the substance to determine the odor (Tr. 11-12, 28-30). The officers discovered that the truck contained in excess of 10,000 pounds of marihuana.

1. Petitioner contends (Pet. 6-14) that the search of his truck, though based on probable cause, was unlawful because it was conducted without a warrant. His theory is that the officers could have immobilized the truck until a warrant authorizing the search was obtained. But that immobilization would itself have been a seizure under the Fourth Amendment. This Court held in *Chambers* v. *Maroney*, 399 U.S. 42, that, when a warrantless seizure of a motor vehicle is justified on the basis of probable cause, an immediate warrantless search of the vehicle is also justified (*id.* at 52):

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

The Fourth Circuit's reasoning in *United States* v. *Bradshaw*, 490 F.2d 1097, relied upon by petitioner, is inconsistent with the rationale of *Chambers*, and the case was, in our view, wrongly decided.[2] Although the position we take here was rejected by the Fourth Circuit in *Bradshaw*, the court of appeals wrote no opinion in the present

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[2]The government's petition for a writ of certiorari in *Bradshaw* (No. 73-1809), which presented the issue raised by petitioner here, was denied by this Court on October 21, 1974.

case, and the basis of its decision is therefore unclear.[3] Since we believe that the result reached by the court is correct, and since this Court denied certiorari in *Bradshaw*, we do not urge the Court to grant the present petition on this issue.

2. Petitioner contends (Pet. 15-20) that the district court should have permitted him to present expert testimony that there are three different species of marihuana and that the species of the marihuana seized from him could not be identified. He argues that the evidence fails to establish that the substance he possessed was "marihuana" within the meaning of 21 U.S.C. 802(15), which provides that "[t]he term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not * * *."

Every court of appeals that has considered the question, however, has correctly concluded that "Congress intended to prohibit possession of all varieties of marihuana." *United States* v. *Kinney*, 505 F.2d 1354 (C.A. 2). Accord, *United States* v. *Rothberg*, 480 F.2d 534 (C.A. 2), certiorari denied, 414 U.S. 856; *United States* v. *Moore*, 446 F. 2d 448 (C.A. 3), certiorari denied, 406 U.S. 909; *United States* v. *Gaines*, 489 F.2d 690 (C.A. 5); *United States* v. *Burden*, 497 F.2d 385, 387 (C.A. 8) *United States* v. *King*, 485 F.2d 353, 361 (C.A. 10); *United States* v. *Walton*, C.A. D.C., No. 74-1790, decided January 23, 1975.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[3]The district court upheld the search as incident to a lawful arrest (Tr. 60-61).